## SCOTT & ENGLISH (M) SDN. BHD. v. YEK TOH MING

**[O.C.J. (Chong Siew Fai J.), September 24, 1984]**
**[Kuching – Originating Motion No. Kg. 9 of 1983]**

*Legal Profession – Advocates and Solicitors – Counsel appearing in court – Whether authorized or instructed – Trial court dismissing action – Whether order wrong in law – Certiorari – Mandamus – R.H.C. 1980, O.53, r.5(1).*

*Administrative Law – Counsel appearing in court – Whether authorized or instructed – Trial court dismissing action – Whether order wrong in law.*

*Practice & Procedure – Counsel appearing in court – Whether authorized or instructed – Trial court dismissing action – Whether order wrong in law.*

Pursuant to leave of court, the applicant applied by motion for an order of *certiorari* to quash the order made by the learned President of Sessions Court, Sibu, dismissing the action of the applicant against the respondent Yek Toh Ming, and for an order of *mandamus* directing the President to hear and determine the said action according to law. Copies of the relevant documents had been served on the Registrar of the Sessions Court, Sibu, and on the respondent, and, pursuant to O.53, r.5(1), on the Attorney-General.

In the court below, the notes of proceedings of the President showed that the plaintiff (the applicant) and its advocate did not appear and that the so-called "stand-in advocate" had not been instructed and was not the advocate or solicitor on record and thus had no *locus standi*. The President dismissed the action, thereby giving rise to the present application. The gist of the applicant's complaint was that the order of the President was wrong in law on the face of the record.

**Held**: allowing the application: (1) the remarks or findings of the President that the advocate "has not been ... instructed" are, on record, unsupported by any evidence or statement made in court. To come to a conclusion where there is no evidence or material to support is to make an error in law;

(2) there is also no evidence or statement to support the remark or finding of the President that "the so-called 'stand-in advocate' who has not been briefed or instructed". If the President doubted the authority or instructions of counsel to appear, the President should have inquired into the matter or suspended the proceeding to satisfy himself of the situation;

(3) the order of the President dismissing the action should be removed into the Court and be quashed. The action should be remitted to the Sessions Court to be dealt with in accordance with law.

*Halsbury's* Laws of England, 4th Edition, Vol. 3, paragraph 1179, cited with approval: "When counsel appears in court and states that he is instructed, the Court will not inquire into his authority to appear."

*Cases referred to:*

(1) *Bean* v. *Doncaster Amalgamated Collieries* [1944] 2 All E.R. 279, 284.

(2) *R.* v. *Birmingham Compensation Appeal Tribunal* [1952] 2 All E.R. 100.

ORIGINATING MOTION.

*T.O. Thomas* for the applicant *(ex parte)*.

*Cur. Adv. Vult.*

**Chong Siew Fai J.**: This is a motion taken out pursuant to leave of this Court granted on October 13, 1983 for an Order of *Certiorari* to quash the order made by the learned President of the Sessions Court, Sibu on July 29, 1983 dismissing the action (Summons No. SB/21/83) between the applicant (plaintiff) and one Yek Toh Ming (defendant), and for an Order of *Mandamus* directing the learned President aforesaid to hear and determine the said action according to law.

Copies of the motion and of the statement and affidavit referred to therein had been served on the Registrar of the Sessions Court, Sibu and on the said Yek Toh Ming as shown in the affidavits of Gerald Chee Teck Hock affirmed on January 19, 1984 and February 9, 1984 respectively. A true copy of the order complained of verified by affidavit had also been served on the Attorney General, Malaysia, pursuant to Order 53 r.5(1).

The background leading to the making of the order complained of may be briefly outlined as follows. The applicant brought the action against the said Yek Toh Ming. The action was dismissed by the learned President on July 29, 1983. The proceedings in court recorded by the learned President as shown in Exhibit "R" annexed to the statement made on application for leave to issue this motion reads:

*"29-7-83:*

The Plaintiff his advocate did not appear.
Action dismissed.

There is no such advocate known as a "stand-in advocate" and he is not an *amicus curiae*. The so-called "stand-in advocate" who has not been briefed or instructed is not the advocate or solicitor on record and thus has no *locus standi* in this proceeding.

(Sgd.) Y.C. Chiu
29/7/83."

The grounds upon which the present relief is sought are as follows:

"(1) The order of the learned President was wrong in law on the face of the record, copy of which is annexed hereto marked "R".

*Alternatively*

The learned President erred in law in holding that the "plaintiff his advocate did not appear", as indeed, David L.C. Teng Esquire, an advocate of this Honourable Court did appear and did announce that he had been duly instructed to appear as Counsel for the Plaintiff.

(2) The learned President erred in law in failing to accept the announcement of David Teng Esquire, that he had been instructed to appear as Counsel for the Plaintiff."

In the affidavit of David Teng Lung Chi, an advocate, made on August 22, 1983, he said he was instructed by Messrs. Thomas & Co. advocates for the plaintiff to appear as counsel at the hearing of the case (Summons No. SB/21/83) on July 29, 1983 and that he appeared as instructed. The note of proceedings does not show Mr. David Teng was in court. However, having regard to the affidavit evidence of Mr. Teng and in the absence of evidence or statement to the contrary, I am prepared to accept that he was present before the learned President in the Sessions Court, Sibu, at the material time on the date in question.

In his affidavit Mr. David Teng also said that when the case was called he informed the Court that he was appearing for the plaintiff (the applicant in this motion) having been instructed by the advocates on record, namely, Messrs. Thomas & Co. of Kuching. He denied having stated to the Court that he was "standing in for Mr. T.O. Thomas". To strengthen his point, the content of a letter of July 25, 1983 from Messrs. Thomas & Co. to Messrs. David Teng & Co. was reproduced in which Messrs. Thomas & Co. stated that they had not asked Mr. David Teng to "stand in" as they did not understand the expression and confirmed that they have instructed Mr. Teng to appear as counsel for the plaintiff.

The date of the said letter (July 25, 1983) is 4 days before the return day of the said Summons No. SB/21/83. There is no evidence as to when the said letter was received and read by Mr. Teng. In any event, so far as concerning the motion, the said letter, in my view, merely notified Messrs. David Teng & Co. what the writer thought of the words "stand in" and confirmed the instructions of the appearance of counsel in Court. Assuming that the letter arrived in time and was read by Mr. Teng prior to the Court hearing on July 29, 1983, it did no more than indicating a higher probability that in the light of the content of the letter, Mr. Teng would not have used the words "stand in" or the like. In my opinion, the point that really matters is what Mr. Teng had exactly stated in Court. In his short judgment the learned trial President said that: "The so-called 'stand-in advocate' who has not been briefed or instructed is not the advocate or solicitor on record and thus has no *locus standi* in this proceeding." I would consider this remark in two aspects. First, regarding the words 'stand-in advocate' referred to by the learned trial President, nowhere in his note does it show that that was what in fact was said and who said it and least of all, that Mr. Teng said it. Neither is there any evidence or material in the note of proceedings to justify the finding or statement that advocate "has not been .... instructed". In other words, the remarks or findings of the learned trial President are, on record, unsupported by any evidence or statement made in Court. To come to a conclusion where there is no evidence or material to support is to make an error in law. *Bean* v. *Doncaster Amalgamated Collieries*[1] *R.* v. *Birmingham Compensation Appeal Tribunal*[2].

In his affidavit made on August 22, 1983, Mr. Teng said that he informed the Court that he was appearing for the plaintiff having been instructed by Messrs. Thomas & Co. of Kuching and he denied having told the Court that he 'stood in' for Mr. T.O. Thomas. On the other hand, the note of proceedings does not record what Mr. Teng had said in Court. Nor is there anything contradicting what he had deposed. However, in view of what I have stated in the paragraph immediately preceding *i.e.* no material in support of the learned President's remark or finding, it is unnecessary to dwell on what Mr. Teng exactly said in Court.

Secondly, I would deal with the remark or finding of the learned trial President that "the so-called 'stand-in advocate' *who has not been briefed or instructed .....*" Here again there is no evidence or statement to support it. On the other hand, in his affidavit Mr. Teng said he had been instructed by Messrs. Thomas & Co. to appear as counsel and that he appeared in the Sessions Court at Sibu at the time and on the day in question and informed the Court that he was appearing for the plaintiff having been instructed by the advocates on record namely Messrs. Thomas & Co. of Kuching. In the absence of any material in the notes of proceedings and in the absence of any evidence to the contrary I am inclined to accept what Mr. Teng

stated in his affidavit. In *Halsbury's* Laws of England 4th Edition Vol. 3 paragraph 1179, the following passage appears: "When counsel appears in court and states that he is instructed, the Court will not inquire into his authority to appear, ..." In any event, if the learned President had any doubt as to the authority or instructions of Mr. Teng to appear, he should have taken such action as inquiring into the matter or suspending the proceedings until he was satisfied of the position of Mr. Teng. If such a course was taken, the position or authority of Mr. Teng would have been clear.

For the above reasons, the motion is allowed. There shall be an order that the order of the learned President made on July 29, 1983 whereby the action Summons No. 5B/21/83 was dismissed be removed into this Court and thereupon be quashed. I further order that the said action be remitted to the said Sessions Court for it to be dealt in accordance with law.

*Motion allowed.*

Solicitors: *Thomas & Co.*

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## DAVID ANTHONY v. PUBLIC PROSECUTOR

**[O. Cr. J. (Gunn Chit Tuan J.) July 9, September 25 & October 15, 1984]**

**[Kuala Lumpur – Selangor Criminal Application No. 1 of 1984]**

*Administrative Law – Bias – Principal witness refused by magistrate to give evidence as she was in open court during prosecution's case – Application for case to be tried de novo by another magistrate – Test applied by court – Whether there was "a real likelihood of bias" on the magistrate's part.*

*Evidence – Principal witness refused by magistrate to give evidence as she was in open court during prosecution's case – Whether there was "a real likelihood of bias".*

The applicant was charged on March 3, 1982 for criminal intimidation under section 506 of the Penal Code in Kelang Magistrate's court. He applied for an order that his case be tried *de novo* by another magistrate. In support of his application he claimed that when his principal witness, one Miss V. N. Verny, was called to the witness stand by his counsel and entered the court, the magistrate on her own motion stated that that witness had already finished giving evidence. But when the said witness protested that she had not yet given her evidence the magistrate changed her words to the effect that that witness was in court throughout the prosecution's case and also during the recording of the evidence of the first defence witness.

The Public Prosecutor in opposing the application relied on an affidavit of Woman Inspector Hazmi bte. Baharudin who was the prosecuting officer in that case. In an affidavit affirmed by the said woman inspector on August 1, 1984, she denied the above allegation of the applicant and stated that the magistrate merely said that the witness Miss V. N. Verny was present in open court during the prosecution's case.

Miss V. N. Verny had also written a letter to the learned Chief Justice on November 8, 1983 (Exhibit DA1 attached to the affidavit of the applicant dated June 21, 1984) in which she alleged that the magistrate had said "You were in open court when the first defence witness and during the time the prosecution witnesses were giving evidence", and after a denial by her the magistrate shouted angrily "Don't deny, you are a liar, you don't lie". The magistrate in a letter to the Chief Justice on November 30, 1983, stated that she did not deny that she had said, "You must tell the truth, don't tell lies here (Court)".

The applicant claimed that Miss V.N. Verny was a key-witness for the defence and he feared that her evidence might not be dispassionately evaluated by the said magistrate and that there might be a miscarriage of justice.

**Held**, allowing the application: (1) the test to be applied by magistrates is whether in the circumstances there would be the appearance of bias on their part, rather than actual bias, if they proceed to hear the case;

(2) if reasonable and fair-minded persons sitting in the Kelang Magistrate's court and following the proceedings, might question or doubt the fairness of the trial and think that there was a real likelihood of bias, and might go away thinking "The magistrate was biased", then it would be preferable in the circumstances that the magistrate concerned should not sit further to hear the case;

(3) this case should therefore be tried *de novo* before another magistrate in the Kelang Magistrate's court.

*Cases referred to:*

(1) *Maleb bin Su* v. *Public Prosecutor* [1984] 1 M.L.J. 311, 312.

(2) *Cooper* v. *Wilson & Ors.* [1937] 2 K.B. 309, 345 to 347.

(3) *Law* v. *Chartered Institute of Patent Agents* [1919] 2 Ch. 276, 290.

(4) *R.* v. *Altrincham Justices* [1975] 1 Q.B. 549, 552.

(5) *R.* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259.

(6) *R.* v. *Liverpool City Justices, Ex parte Topping* [1983] 1 All E.R. 490, 494.

(7) *Metropolitan Properties Co. (FGC) Ltd.* v. *Lannon* [1969] 1 Q.B. 577, 599.

(8) *Manokaran & Anor.* v. *Public Prosecutor* [1979] 1 M.L.J. 262, 263.